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Supreme Court of the United States

October 1994

In re International Nutronics, Inc.,

Debtor.

Jerome Robertson, Chapter 7 Trustee
of International Nutronics, Inc.,

Plaintiff-Petitioner,

v.

Isomedix, Inc., a Delaware corporation;
Radiation Sterilizers, Inc., a California
corporation, individually and as joint
venturers,

Defendants-Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

DID THE NINTH CIRCUIT ERR IN CONCLUDING THAT A BANKRUPTCY COURT'S ROUTINE ORDER AUTHORIZING A SALE OF ASSETS FREE AND CLEAR OF LIENS BARRED SUBSEQUENT NON-CORE CLAIMS?

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OFFICIAL AND UNOFFICIAL OPINIONS DELIVERED IN ROBERTSON V. ISOMEDIX, INC., ET AL.

1. 28 F.3d 965 (9th Cir. 1994).

2. 3 F.3d 306 (9th Cir. 1993) (withdrawn and replaced by 28 F.3d 965 (9th Cir. 1994).

3. Order, United States District Court for the Northern District of California, Vaughn R. Walker, District Judge, Presiding, January 29, 1991.

STATEMENT OF JURISDICTION

Petitioner requests review of the decision of the United States Court of Appeals for the Ninth Circuit entered on June 27, 1994 affirming the United States District Court for the Northern District of California's grant of summary judgment in favor of Respondents. Statutory jurisdiction is conferred on the Supreme Court to review the judgment by writ of certiorari by 28 U.S.C.A. §1334 (West 1993).

RELEVANT LAW FOR REVIEW

1. United States Constitution, Article III, Section 1:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. 28 U.S.C.A. §157 (West 1993):

§157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to --

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or

unliquidated personal in jury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder

relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal in jury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and

judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C.A. §1334 (West 1993):

§1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such

proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 11 U.S.C. §363(n) (West 1993):

§363. Use, sale or lease of property

n. The Trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

5. 15 U.S.C. §15(a) (West Supp. 1994):

§15. Suits by persons injured; amount of recovery

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

I.
STATEMENT OF THE CASE

A. Statement of Facts.

The facts of this case are not disputed.[1] Isomedix, Inc. (hereafter "Isomedix") and Radiation Sterilizers, Inc. (hereafter "RSI"), the two defendants below, were the only bidders in the sale of the principal asset of the bankruptcy estate of International Nutronics, Inc. (hereafter "INI"). They initially put in separate, competitive bids in the range of $600,000. Then, in response to an invitation by the Trustee of the bankruptcy estate to re-bid, RSI and Isomedix agreed that they would not compete with each other. Instead, they put in a "joint bid," of $350,000. Since theirs was the only bid, the Trustee had to accept it.

INI was one of just a few companies that sterilize medical products and other materials with radiation. Like the other companies in the industry, INI used Cobalt-60 isotope as the radiation source in the sterilizing process.

The very nature of Cobalt-60 compelled the Trustee to immediately seek a buyer for it. Cobalt-60 is highly radioactive and rapidly deteriorates. As it decayed, its value to the estate and its creditors declined correspondingly. Moreover, because of significant health risks attendant to Cobalt-60, the health authorities and INI's landlords threatened to take possession of INI's facilities and move the radioactive isotope.

In November of 1987, the Petitioner, the Trustee of the INI bankruptcy estate, solicited bids for the Cobalt-60. In response to his solicitation, the Petitioner received a bid from Isomedix and a bid

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[1] The only issue before the District Court and the Ninth Circuit was the *res judicata* effect of the bankruptcy court order authorizing the sale of property. The other facts are only relevant to the disposition of this matter to the extent that they illustrate the context of the suit and the egregiousness of the defendants' conduct. For the convenience of the Court, Petitioner adopts the facts as recounted by the Ninth Circuit with only minor exceptions, which are duly noted. Accordingly, references to the record have been omitted.

from RSI. Isomedix and RSI were competitors in the radiation sterilization business.[2]

Isomedix offered 70¢ per curie for the Cobalt-60 stored at INI's Irvine, California facility for a total of $600,000. RSI offered to purchase the same Cobalt-60 for 65¢ per curie. While neither RSI nor Isomedix offered to purchase Cobalt-60 stored at INI's Palo Alto facility, each agreed to remove or properly dispose of the material at cost. Later, RSI confirmed its bid and as an alternative offered to pay 2% over any other written offer. The Trustee did not receive any other bids.

The Trustee informed RSI and Isomedix that he wanted a final and best bid from the two bidders that was commensurate with the market price of Cobalt-60. Knowing that they were the only bidders, Respondents entered into an agreement not to compete with each other in bidding. To effect their new scheme, Respondents each withdrew their earlier bids and offered to purchase both supplies of Cobalt-60 for $350,000 as a joint venture.

By this point, the Trustee had no choice but to sell the Cobalt-60 to the joint venturers. During the entire bidding process, only Isomedix and RSI expressed interest in the Cobalt-60. Respondents were perfectly aware that the extenuating circumstances of the bankruptcy estate would ultimately force the Trustee to sell the Cobalt-60 regardless of the inappropriateness of their bid. In fact, with no alternative, the Trustee did accept the joint bid. On March 8, 1988, the bankruptcy court issued a routine Order Authorizing Sale of Cobalt-60 Free and Clear of Liens (hereafter, "Order Authorizing Sale").[3]

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[2] The record below establishes that since the early 1980's, RSI had attempted to combine in some fashion with its competitor, Isomedix. The Federal Trade Commission blocked such an attempt in 1988 on the grounds of restraint of trade.

[3] The Ninth Circuit inaccurately characterized the bankruptcy court's order as "unconditionally confirming the sale." In fact, the order merely provided the Trustee with the authority to sell the property.

B. Procedural History.

The Trustee filed this action in bankruptcy court on January 5, 1990. The Complaint alleged causes of action arising under Bankruptcy Code §363(n) and Sections 1 and 2 of the Sherman Act. As a matter related to a case under Title 11, jurisdiction was conferred on the United States District Court by 28 U.S.C. §1334. The District Court withdrew its reference to the bankruptcy court by stipulation of the parties on September 25, 1990.

Respondents filed a motion for summary judgment based on the alleged *res judicata* effect of the bankruptcy court's order authorizing the sale of the Cobalt-60. The District Court granted Appellant's motion and the Trustee appealed.[4]

On August 10, 1993, the United States Court of Appeals for the Ninth Circuit issued its decision on the Trustee's appeal. Robertson v. Isomedix, Inc. et al., 3 F.3d 306, No. 91-15253, slip op. 8657-8666 (9th Cir. 1993) (withdrawn and replaced by 28 F.3d 965 (1994) (hereafter cited as Robertson (I), No. 91-15253, slip op. 8657). The Ninth Circuit affirmed in part and reversed in the part the District Court's decision, affirming the dismissal of the Trustee's §363(n) claim. The Ninth Circuit decided that claims based on 11 U.S.C. §363(n) must be brought within the one-year period provided for in Federal Rule of Civil Procedure §60(B). Appellant's otherwise valid §363(n) claim was found to be untimely since the Trustee filed the complaint more than one year after the bankruptcy court issued the Order Authorizing Sale.

The Ninth Circuit also found in its first opinion that the Trustee's antitrust claims were barred by the Order Authorizing Sale. The Court determined that the antitrust claims could not have been disposed of by the order since they are not core matters, observing that:

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[4] Petitioner seeks review of the Ninth Circuit's opinion in Robertson v. Isomedix, Inc., 28 F.3d 965 (9th Cir. 1994). This opinion, as well as the Ninth Circuit's decision before rehearing, the Order of the United States District Court for the Northern District of California granting defendants' Motion for Summary Judgment, and the Order Authorizing Sale of Cobalt-60 Free and Clear of Liens are contained in the Appendix hereto.

> The antitrust claims could not have been asserted in the sale order proceeding. The bankruptcy court has jurisdiction to entertain cases arising under the Bankruptcy Code and "core proceedings arising under Title 11." 28 U.S.C. §157 (Supp. 1993) Core proceedings are "matters concerning the administration of the estate" and rights created by Chapter 11. (Citations omitted.) Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are not core proceedings.

The Respondents filed a Petition for Rehearing and Suggestion For Rehearing En Banc and Petitioner filed a Response to Respondents' Petition. The Ninth Circuit ruled on Respondents' Petition without hearing.

On June 27, 1994, the Ninth Circuit withdrew its original opinion and filed a new decision. Robertson v. Isomedix, Inc., 28 F.3d 965, No. 91-15253, slip op. 6931-6943 (9th Cir. 1994) (hereafter cited as Robertson (II), No. 91-15253, slip op. 6931). The Ninth Circuit confirmed its original analysis relating to the Trustee's §363(n) claims. However, the Ninth Circuit reversed its first opinion with respect to the Trustee's antitrust claims. The court determined that bankruptcy court orders act as final orders even to non-core claims.

> Even if we assume, without deciding, that the antitrust claim is non-core, it nevertheless could have been asserted in the bankruptcy court. The bankruptcy court may hear non-core matters that are "related to a case under Title 11." 28 U.S.C. §157(c)(1). Although the bankruptcy court does not have power to render a decision in non-core matters, the claim will be decided. The bankruptcy court may submit proposed findings of fact and conclusions of law, which the district court reviews *de novo*. (Citations omitted.) Or the reference can be withdrawn when the claim is made, and the matter

> decided from the beginning by the district court. . . . Thus the claim could have been asserted at the time of the proceeding confirming sale, and this opportunity is sufficient to satisfy that requirement of the doctrine of *res judicata*. (Citations omitted.)

In so finding, the Ninth Circuit ignored the Constitutional parameters of a bankruptcy court's jurisdiction as set forth in this Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858 (1982).

Petitioner respectfully requests that this Court review the Ninth Circuit's determination that a ministerial bankruptcy court order authorizing a sale free and clear of liens can bar unasserted claims over which the bankruptcy court lacked jurisdiction to issue a final order.

II.
ARGUMENT

A. Overview.

The question raised by this case, which has caused no little confusion and conflict among the Circuit Courts of Appeals, is the effect of the bankruptcy court's Order Authorizing the Sale of Cobalt-60 Free and Clear of Liens. The bankruptcy court's issuance of the order authorizing the sale was a ministerial act, authorizing the sale of property free and clear of liens to the only bidder. It was not, in any way, a judgment on a pending controversy.

Under Bankruptcy Code §363, the trustee must receive the bankruptcy court's authorization to sell encumbered property of the estate. Such orders are a matter of routine and are granted on a perfunctory basis. The sole purpose and effect of such orders is to dispose of the property for cash giving the buyer title clear of encumbrances. The idea that there was an opportunity to litigate anything prior to the issuance of the order is a legal fiction.

Even accepting the concept that certain claims could have been brought to the bankruptcy court in connection with the application for an order authorizing the sale, the antitrust claims could not have been. The Ninth Circuit correctly concluded in its original opinion that the Order Authorizing Sale barred only claims over

which the bankruptcy court would have had core jurisdiction. The Court reasoned that since an antitrust claim is not a "core proceeding" under 28 U.S.C. §157 and since the bankruptcy court is not empowered to render a final decision in non-core matters, the bankruptcy court's Order Authorizing Sale was not *res judicata* as to the antitrust claims.[5] Robertson (I), No. 91-15253, slip op. 8657, 8664-8665.

On rehearing the matter, the Ninth Circuit (without reference to any new case, nor any new facts) reversed itself. The Court of Appeals reasoned that even though the bankruptcy court did not have jurisdiction to hear non-core matters, such claims could have been asserted at the time of the proceeding resulting in the Order Authorizing Sale. Robertson (II), No. 91-15253, slip op. 6931, 6940. The bankruptcy court may hear non-core matters that are related to a case under Title 11. 28 U.S.C. §157(c)(1) (West 1993). Although the bankruptcy court does not have power to render a decision in non-core matters, the bankruptcy court may submit proposed findings of fact and conclusions of law, which the District Court reviews de novo. Robertson (II), No. 91-15253, slip op. 6931, 6940.

The Ninth Circuit's initial decision in this case was well reasoned, and fully consistent with those of other circuits. Its analysis was supported by opinions in the Second, Fifth, Sixth and Seventh Circuits and was consistent with the law in the Ninth Circuit.

The Ninth Circuit's second opinion is in conflict with the other circuits and is indicative of the overall confusion regarding the scope of the *res judicata* effect of bankruptcy court orders. Other Courts of Appeals have squarely held that a bankruptcy court order is not *res judicata* as to claims over which the bankruptcy court did not have core jurisdiction. These cases are in concert with the jurisdictional limitations of bankruptcy courts as recognized by this Court in Northern Pipeline Constr. Co. v. Marathon Pipeline Co.,

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[5] The Court also decided that the Court's Order Authorizing Sale did not have a *res judicata* effect as to Petitioner's claims under Section 363 of the Bankruptcy Code, but that those claims were time barred. These rulings are not within the scope of this Petition for Certiorari.

458 U.S. 50, 102 S.Ct. 2858 (1982) (hereafter "Marathon"). In explicitly disagreeing with the Fifth Circuit, the Ninth Circuit created a conflict among the Circuits and disregarded the Constitutional limits of a bankruptcy court's authority.

B. The Ninth Circuit's Finding that The Order Authorizing Sale Bars Non-Core Claims Is In Direct Conflict With The Law In Other Circuits.

The Ninth Circuit is in conflict with the law in the Second, Fifth, Sixth and Seventh Circuits. In D-1 Enterprises, Inc. v. Commercial Bank, 864 F.2d 36 (5th Cir. 1989), the Fifth Circuit concluded that bankruptcy court orders in limited bankruptcy proceedings did not bar non-core claims.[6] In Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183 (5th Cir. 1990) noted above, the Fifth Circuit found that an order confirming a plan of reorganization did not bar non-core claims since the bankruptcy court lacked jurisdiction to dispose of such claims.

In Barnett v. Stern, 909 F.2d 973 (7th Cir. 1990), the Seventh Circuit found that a final order in a limited proceeding before the bankruptcy court did not bar a bankruptcy trustee's non-core claims.

Finally, in Sure-Snap v. State Street Bank, 948 F.2d 869 (2nd Cir. 1991), and Sanders Confectionery Products v. Heller Financial, Inc., 973 F.2d 474 (6th Cir. 1992), cert. denied 113 S.Ct. 1046 (1993), the Second and Sixth Circuits, respectively, found that an order confirming a plan of reorganization barred the debtor's non-core claims against creditors. However, both the Second and Sixth Circuits recognized that bankruptcy orders rendered in more limited proceedings prior to the order of confirmation did not bar non-core claims. Sure-Snap, 948 F.2d at 874; Sanders Confectionery, 973 F.2d at 484.

Each of these cases is analyzed in detail below.

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[6] A limited bankruptcy proceeding is one which does have as its purpose the resolution of the entire bankruptcy case. The term excludes only orders confirming plans of reorganization in Chapter 11 cases and orders of discharge in Chapter 7 cases.

1. The Ninth Circuit Is In Conflict With Fifth Circuit Decisions Holding That Bankruptcy Court Orders Do Not Bar Non-Core Claims.

The Ninth Circuit's decision below is in direct conflict with at least three decisions in the Fifth Circuit. Robertson (II), No. 91-15253, slip op. 6940 (disagreeing respectfully with Fifth Circuit decisions finding that core proceedings do not bar later non-core claims). The Fifth Circuit's opinion in Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183 (5th Cir. 1990), is consistent with the jurisdictional scheme that Congress enacted in response to this Court's decision in Marathon. Barnett, 909 F.2d at 978-79. In Marathon, this Court found that the jurisdiction conferred on bankruptcy courts by the 1978 Bankruptcy Reform Act impermissibly granted Article III power to non-Article III courts. Under the Supreme Court's ruling, bankruptcy courts can only issue final orders on "core" matters.

In Howell Hydrocarbons, the plaintiff alleged claims for violation of RICO against defendants based on conduct that occurred prior to the bankruptcy court confirmation order. In keeping with Marathon, the Fifth Circuit rejected the defendants' argument that the bankruptcy court order approving the defendants' plan of reorganization barred plaintiff's non-core claims against the defendants. Howell Hydrocarbons, 897 F.2d at 189-90. The Fifth Circuit concluded that plaintiff's RICO claims could not be barred since the bankruptcy court lacked jurisdiction to dispose of such non-core claims. Id. The court stated that,

> While there is a common nucleus of operative facts between the two cases, in that if it had objected to the Plan, Howell would have alleged the same fraudulent actions that it alleges in this case, the remedy sought here and the theory upon which liability is premised are different from what could have been asserted through a request of equitable subordination in bankruptcy court. Moreover, the bankruptcy court would not have had jurisdiction over the RICO claims against defendants.

Id. at 189.

In finding that the bankruptcy court's order could not bar claims over which the bankruptcy court had no jurisdiction, the Fifth Circuit was merely following this Court's determination of the Constitutional boundaries of a bankruptcy court's jurisdiction.

The Fifth Circuit found in D-1 Enterprises, 864 F.2d 36 (5th Cir. 1989), that the debtor's non-core lender liability claims were not barred by a bankruptcy court order in a limited proceeding. The Fifth Circuit noted that,

> [I]t would be odd indeed if a claim that was not required as a compulsory counterclaim by the Bankruptcy Rules and in fact could not be litigated as a defense to the motion for relief from the stay was nonetheless barred by *res judicata* within the same case.

D-1 Enterprises, Inc., 864 F.2d at 39 (5th Cir. 1989).
Odd indeed and contrary to any traditional *res judicata* analyses.

In Latham v. Wells Fargo Bank, 896 F.2d 979 (5th Cir. 1990), the Fifth Circuit again concluded that the plaintiff's non-core claims were not barred by earlier core proceedings. Id. at 984. The validity of the Fifth Circuit's opinion in Latham is not diminished by its later holding in Matter of Baudoin, 981 F.2d 736, 741 (5th Cir. 1993), as suggested by the Ninth Circuit. Robertson (II), 91-15253 at 6940-6941. In Matter of Baudoin, the Fifth Circuit concluded that the claim at issue was core. Matter of Baudoin, 981 F.2d at 740. The court, therefore, did not reach the issue of whether the earlier proceedings barred non-core claims.

2. The Ninth Circuit Is In Conflict With Seventh Circuit Opinions Finding That Bankruptcy Court Orders In Limited Proceedings Do Not Bar Non-Core Claims.

The Ninth Circuit's decision also is in conflict with the Seventh Circuit's decisions related to the preclusive effect of bankruptcy orders in limited proceedings. In Barnett v. Stern, 901 F.2d 973 (7th Cir. 1990), the Seventh Circuit specifically found that

a trustee was not barred from bringing a RICO claim by a prior order in an adversary proceeding.

In Barnett, the trustee's RICO claim was based on a post-petition depletion of estate assets. Prior to filing his RICO complaint, the bankruptcy court had issued an order declaring that assets of a certain trust belonged to the estate. The Seventh Circuit found that the prior order barred the trustee's RICO claim only if the trustee had an opportunity to fully litigate the RICO claim in the earlier limited proceeding. Based on the court's finding that the RICO claim was a non-core matter, the Seventh Circuit determined that the trustee could not have litigated his claim since the bankruptcy court lacked jurisdiction over it.[7]

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[7] Respondents went to great lengths below to cast aspersions on the continued validity of Barnett. Respondents cited In re Kroner, 953 F.2d 317, 320 (7th Cir. 1992), as having "expressly limited Barnett." It did no such thing.

In In re Kroner, the Seventh Circuit found that the trustee's non-core claims were barred by a final order in a prior core proceeding based on the same facts. Id. at 320. The trustee failed to argue both to the bankruptcy court and to the district court that the earlier bankruptcy court order could not bar his non-core claims since the bankruptcy court lacked jurisdiction over them. The Seventh Circuit found that,

> We think the trustee's double waiver of the Barnett argument (in the bankruptcy court as well as in the district court, where he failed to raise it until after entry of judgment) is dispositive,
>
> . . . .

In re Kroner, 953 F.2d at 320.

In fact, in In re Kroner, the Seventh Circuit approved Barnett by reiterating that,

> [T]he bankruptcy court's disposition of a core matter fails to provide a full and fair opportunity to litigate a non-core claim that is not subject to the bankruptcy court's jurisdiction.

Id. at 320.

3. The Second And Sixth Circuits Recognize That An Order Issued In A Limited Bankruptcy Proceeding Cannot Preclude Non-Core Claims.

The Ninth Circuit's finding that the Trustee's non-core antitrust claims were barred by the Order Authorizing Sale is inconsistent with decisions in both the Second and Sixth Circuits. Both the Second Circuit and Sixth Circuit recognize that while an order confirming a plan of reorganization, which finally disposes of a bankruptcy case, may bar non-core as well as core matters, an order that results from a more limited proceeding within the bankruptcy case bars only core claims. Sure-Snap, 948 F.2d at 874, Sanders Confectionery, 973 F.2d at 484. Here, the only order of the bankruptcy court at issue was a routine order authorizing the Trustee to sell the Cobalt-60 free and clear of liens to the only bidder.

In Sure-Snap, the Sixth Circuit noted that the debtor's non-core lender liability claims would not have been barred by the bankruptcy court's order in an adversary proceeding during the pendency of the bankruptcy case. Sure-Snap, 948 F.2d at 874. The debtor had brought an adversary proceeding to attack the validity of the creditor's liens against the estate's assets. The Sixth Circuit stated that

> [I]n and of itself, the adversarial proceeding that accompanied the formal hearing was not of the scope that would have precluded the bringing of the lender liability action.

Id. at 874.

In other words, just because a matter should have been resolved in the context of the bankruptcy case does not mean that it is barred if it is not raised during a particular proceeding during the pendency of the case.

In Sanders Confectionery, the Sixth Circuit rejected the debtor's arguments because the cases on which it relied related to orders in proceedings more limited than those resulting in an order confirming a plan. The debtor in Sanders Confectionery argued that only compulsory counterclaims are barred by *res judicata* and relied

on D-1 Enterprises, Inc. v. Commercial Bank, 864 F.2d 36 (5th Cir. 1989). In D-1 Enterprises, the Fifth Circuit found that the debtor's lender liability action was not barred by a prior bankruptcy court order in a limited proceeding. The Sixth Circuit determined that the Fifth Circuit's opinion in D-1 Enterprises rested largely on the limited nature of the proceeding that purportedly had the *res judicata* effect. The Sixth Circuit cited with approval subsequent Fifth Circuit opinions that found that the D-1 Enterprises opinion merely recited that when a claim cannot be litigated effectively, it is not precluded.

The Ninth Circuit's decision is in conflict with both Second Circuit and Sixth Circuit law. No proceeding is more limited than a bankruptcy court's ministerial act authorizing a trustee to sell an asset to the only bidder.[8] The preclusive effect of the order can only reach what could have been litigated. The antitrust claims, therefore, are not barred.

4. The Ninth Circuit Stands Alone In Finding That A Bankruptcy Court Order In A Limited Proceeding Can Bar Non-Core Claims.

Until the Ninth Circuit's ruling in this case, no court had ever found that a bankruptcy court order in a limited proceeding could operate to bar non-core claims. As authority for its ruling, the Ninth Circuit indirectly cited the Sixth Circuit's opinion in Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 S.Ct. 1046 (1993), the Second Circuit's opinion in Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F.2d 869, 873 (2nd Cir. 1991), and the Seventh Circuit's opinion in Matter of Met-L-Wood Corp., 861 F.2d 1012, 1016-17 (7th Cir. 1988), cert. denied, Gekas v. Pipin, 490 U.S. 1006, 109 S.Ct. 1642 (1984). None of these opinions supports the proposition that a bankruptcy court order in a limited proceeding bars non-core claims.

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[8] Bankruptcy trustees seek orders from bankruptcy courts as a matter of routine throughout the administration of a bankruptcy case. Requiring that a trustee litigate all core and non-core matters that may be barred by any given order could bring the effective administration of bankruptcy cases to a standstill.

In Sure-Snap Corporation, 948 F.2d 869, the Second Circuit found that the *res judicata* effect of the order confirming the plaintiffs' plan of reorganization barred the plaintiffs' lender liability claims. The Second Circuit held that the purpose of the order of confirmation was to compromise all matters that the debtor or its creditors might have raised to advance their interests, including the creditors' proofs of claims and the debtor's petition for protection from creditors. Id. Essential to the valuation of the debtor's obligation to the creditor was a determination of the effect of the creditor's conduct that gave rise to the lender liability claims. Id. Accordingly, the Second Circuit determined that the lender liability claims should have been raised during the bankruptcy case.

While the Sure-Snap decision is not as literally consistent with the jurisdictional scheme mandated by Marathon as is Howell Hydrocarbons, it is consistent with internal structure of a bankruptcy case. During the course of a bankruptcy proceeding, a myriad of issues both core and non-core are resolved. However, during the course of the bankruptcy case, a trustee may go to any forum to fulfill his or her duty to liquidate an asset of the estate. 11 U.S.C.A. §323, §704 (West 1993); Bankruptcy Rule 6009. Accordingly, by the conclusion of the case, all of the matters that affect the debtor-creditor relationship will have been resolved and are finally disposed of by the order of discharge in a Chapter 7 case or by the order confirming a plan in a Chapter 11 case. 11 U.S.C.A. §1141 (West 1993).

As the Second Circuit had done in Sure-Snap, in Sanders Confectionery, Inc. v. Heller Financial, Inc., 973 F.2d 474 (6th Cir. 1992), the Sixth Circuit considered the preclusive effect of an order confirming a plan of reorganization and employed the logic used by the Second Circuit in Sure-Snap. The Sixth Circuit found that in confirming the plan of reorganization, the bankruptcy court finally resolved all of the issues between the debtor and creditor, including non-core claims. Sanders Confectionery, 973 F.2d at 482.

The Ninth Circuit's decision is not supported by Sure-Snap or Sanders Confectionery since the order involved in this case is from a limited bankruptcy proceeding. As described above, both the Second Circuit in Sure-Snap and the Sixth Circuit in Sanders Con-

fectionery recognized that bankruptcy court orders from limited proceedings do not bar non-core claims.

The Seventh Circuit's opinion in Matter of Met-L-Wood Corp., 861 F.2d 1012 (7th Cir. 1988), also fails to support the Ninth Circuit's ruling. In Met-L-Wood, a bankruptcy trustee brought fraud and racketeering claims arising out of a collusive scheme related to a sale of estate assets. The Seventh Circuit determined that the claims were supported by nothing but rumor and innuendo and did not warrant application of the fraud exception to the rules of finality in Rule 60(b). The Seventh Circuit wholly failed to address the issue of jurisdiction in Met-L-Wood. Accordingly, the decision does not support the conclusion that a bankruptcy court order in a limited proceeding bars non-core claims.

In fact, the Seventh Circuit's opinion in Barnett, 909 F.2d 973 (7th Cir. 1990), supports the contrary conclusion: that a bankruptcy court order in a limited proceeding ***does not*** bar non-core claims. Since the Seventh Circuit decided Barnett two years after it decided Met-L-Wood, to the extent that the opinions are inconsistent, Barnett is the controlling authority. The Seventh Circuit's conclusion in Barnett that bankruptcy court orders in limited proceedings do not bar non-core claims is the state of the law in the Seventh Circuit.

C. The Bankruptcy Court Lacked Core Jurisdiction To Decide The Trustee's Antitrust Claims.

Federal district courts have exclusive jurisdiction over antitrust claims. Plaintiff's antitrust claims arise under the Sherman Act and are brought pursuant to §4 of the Clayton Act. 15 U.S.C.A. §15 (West Supp. 1994). The Clayton Act expressly provides that a private antitrust plaintiff may sue for treble damages ". . . in any district court of the United States." Id. Based upon the perceived need for effective uniform nationwide administration of the Sherman and Clayton Acts, a long line of decisions has firmly established that jurisdiction over federal antitrust claims lies exclusively in the United States District Courts. As noted by Judge Learned Hand in Lyons v. Westinghouse Electric, 222 F.2d 184 (7th Cir. 1955), cert. denied, Walsh v. Lyons, 350 U.S. 825:

> In the case at bar it appears to us that the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply immunity of their decisions from any prejudgment elsewhere; . . .

In its original opinion, the Ninth Circuit determined that the Trustee's antitrust claims were non-core. The court found that,

> The antitrust claims could not have been asserted in the sale order proceeding. The bankruptcy court has jurisdiction to entertain cases arising under the Bankruptcy Code and "core proceedings arising under Title 11." 28 U.S.C. §157 (Supp. 1993). Core proceedings are "matters concerning the administration of the estate" and rights created by Chapter 11. Id.; see also, In re Mankin, 823 F.2d 1296, 1299-1307 (9th Cir. 1987) (discussing distinction between core and non-core issues), cert. denied, 485 U.S. 1006 (1988). Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are not core proceedings. In re Castlerock Properties, 781 F.2d 159, 162 (9th Cir. 1986). The bankruptcy court may hear non-core matters that are "related to a case under Title 11." 28 U.S.C. §157(c)(1). But the bankruptcy court is not empowered to render a decision in non-core matters; rather, it submits proposed findings of fact and conclusions of law, which the district court reviews *de novo*. Id.; In re Mann, 907 F.2d 923, 926 (9th Cir. 1990). This distinction between core and non-core matters ensures that the bankruptcy courts will not encroach impermissibly in the provence reserved by the Constitution to Article III courts. Mankin, 823 F.2d at 1300-07 (discussing Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)).

The Ninth Circuit's conclusion that the antitrust claims are non-core was correct and consistent with the law in other Circuits.

In its second opinion, the Court determined that it did not have to reach the issue and therefore did not. The Ninth Circuit's conclusion in its initial opinion that the claims are non-core was consistent with the Ninth Circuit's standard for distinguishing between core and non-core matters. In In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986), the court stated that,

> [A] court should avoid characterizing a proceeding as "core" if to do so would raise constitutional problems. . . . The apparent broad reading that can be given to . . . [the definition of a core proceeding] should be tempered by the Marathon decision.

Id. at 162 (cited with approval in In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990)).

Constitutional problems are raised every time the jurisdictional scheme set forth in Marathon is abrogated. This Circuit has held that the Marathon decision,

> deprive[s] the bankruptcy court of jurisdiction "to make final determinations in matters that could have been brought in a district court or a state court." . . . To hold otherwise would allow the bankruptcy court to enter final judgments that this court has held unconstitutional.

Castlerock Properties, 781 F.2d at 162 (quoting In re Thomas, 765 F.2d 926 (9th Cir. 1985)).

The Seventh Circuit's opinion in Barnett v. Stern, 909 F.2d 973 (7th Cir. 1990), provides additional support for the Ninth Circuit's initial finding that the claims were non-core. As discussed above, the trustee in Barnett filed a RICO claim based on the defendant's alleged depletion of trust funds, which were assets of the estate, after the bankruptcy filing. The Fifth Circuit found that the claim would only be barred by the *res judicata* effect of the previous bankruptcy court order if the RICO claim was core.

The Barnett court determined that the RICO claim was non-core. In reaching its conclusion, the court relied on the Fifth Circuit's analysis of what constitutes a core proceeding in In re Wood, 825 F.2d 90 (5th Cir. 1987). In that case, the Fifth Circuit stated that,

> If the proceeding does not invoke substantive right created by the federal bankruptcy law and is not one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under Section 157(c)(1) it is an "otherwise related" or non-core proceeding.

Barnett, 909 F.2d at 973.

In applying that standard, the Seventh Circuit determined that the trustee's RICO claim did not invoke substantive rights created under federal bankruptcy law. Barnett, 909 F.2d at 981. The court also determined that the claim could exist outside of the bankruptcy context even though it is a claim for damages resulting from post-petition diversion of trust funds. Id. Simply, the same claim for the same damages over the same time period could have been prosecuted in federal district court. Id.[9]

Not surprisingly, no court has found that antitrust claims are core proceedings. Such a finding would be contrary to the express grant of exclusive jurisdiction in the Sherman and Clayton Acts and the prescripts of this Court's holding in Marathon. Plainly it is in the best interests of bankruptcy estates and their creditors that complex antitrust matters be decided by Article III courts that are accustomed to determining such issues.

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[9] The Barnett court also supported its holdings on several bankruptcy court cases, including In re Posey, 81 B.R. 416, 417 (Bankr. M.D. Miss. 1987) (finding that debtor's RICO complaint against creditor bank was a non-core proceeding), and In re Sattler's, Inc., 73 B.R. 780, 784-85 (Bankr. S.D.N.Y. 1987) (noting that trustee's inclusion in his adversary proceeding complaint of RICO claim based on post-petition payments from the debtor which would expand action to include non-core claims). Barnett, 909 F.2d at 981, n.11.

III.
CONCLUSION

The Ninth Circuit stands alone in concluding that a bankruptcy court's order in a limited proceeding can bar non-core claims. Its decision is in conflict with decisions in the Second, Fifth, Sixth and Seventh Circuits. Because its opinion is inconsistent with the jurisdictional scheme for bankruptcy courts set forth in this Court's decision in Marathon, this Petition for Writ of Certiorari should be granted.

DATED: September 22, 1994.

Respectfully submitted,
ROSENBLUM, PARISH & ISAACS
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By _____
Jeffrey J. Parish

Attorneys for Jerome Robertson,
Chapter 7 Trustee of International
Nutronics, Inc., Plaintiff-Petitioner

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re, INTL NUTRONICS, INC.,
Debtor.

JEROME ROBERTSON, Trustee;
Chapter 7 Trustee of International Nutronics, Inc.,
Plaintiff-Appellant,

v.

ISOMEDIX, INC., a Delaware corporation; RADIATION STERILIZERS, INC., a California corporation individually and as joint venturers,
Defendants-Appellees.

No. 91-15253

D.C. No. CV-90-02855-VRW

ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
April 12, 1993—San Francisco, California

Filed August 10, 1993
Withdrawn June 27, 1994
Filed June 27, 1994

Before: William C. Canby, Jr., and Melvin Brunetti, Circuit Judges, and Stephen V. Wilson* District Judge.

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*Honorable Stephen V. Wilson, United State District Judge for the Central District of California, sitting by designation.

Opinion by Judge Canby

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)/Civil Litigation and Procedure

The court of appeals affirmed a district court judgment. The court held that a bankruptcy trustee's claim seeking to avoid a sale on the basis that the sale price was controlled by an agreement among the potential bidders, was not precluded under the doctrine of res judicata, but it was time-barred.

International Nutronics, Inc. was in the business of sterilizing equipment through the use of cobalt-60. Nutronics filed for bankruptcy at a time when it was in possession of partially decayed cobalt-60. Appellant Jerome Robertson, Nutronics' trustee in bankruptcy, solicited bids for the cobalt-60. Appellees Isomedix, Inc. and Radiation Sterilizers, Inc. (RSI) submitted separate bids that were rejected. Having learned that they had been the only bidders, Isomedix and RSI notified Robertson that they had formed a joint venture to purchase the cobalt-60. Robertson accepted their joint bid and sought from the bankruptcy court an order approving the sale. The court issued an order unconditionally confirming the sale.

About 22 months later, Robertson filed an adversary proceeding in the bankruptcy court against Isomedix and RSI. The parties agreed to withdraw the reference to the bankruptcy court, and the proceeding returned to district court. Alleging that the joint venture constituted an unlawful combination, the complaint sought relief under 11 U.S.C. § 363(n) and the Sherman Act. The defendants moved for summary judgment, asserting that the claims were barred under the doctrine of res judicata. The district court granted the motion.

Robertson appealed, contending that the doctrine of res judicata does not foreclose him from seeking damages under § 363(n) or from bringing an action under the Sherman Act.

[1] Section 363(n) provides that a bankruptcy trustee may avoid a sale if the sale price was controlled by an agreement among the potential bidders.

[2] The bankruptcy court's sale order did not bar Robertson from asserting a claim under § 363(n). The Ninth Circuit previously held that, for res judicata purposes, § 363(n) is a "statutory exception" to the finality of bankruptcy sale orders.

[3] However, Fed. R. Civ. P. 60(b) imposes a one-year limitations period on motions asking the district court to relieve a party from a final judgment or order. In this case, Robertson did not file the § 363(n) claim until 22 months after the bankruptcy court issued the sale order; therefore, the claim was time-barred. [4] Thus, the district court's dismissal of the § 363(n) claim was affirmed.

[5] In addition, Robertson's antitrust claim could have been asserted in the bankruptcy court. There is no structural obstacle to a "core" proceeding's having a preclusive effect on a later "non-core" claim. [6] The antitrust claim constituted the same cause of action for res judicata purposes as that decided by the order confirming the sale. Thus, the district court was correct in ruling that the antitrust claim was barred.

COUNSEL

Jeffrey J. Parish, Andrea J. Ingram, Rosenblum, Parish & Bacigalupi, San Francisco, California, for the plaintiff-appellant.

Peter J. Busch, Howard, Rice, Nemerovski, Canady, Robertson & Falk, San Francisco, California; Ian N. Feinberg,

Ware & Freidenrich, Palo Alto, California, for the defendants-appellees.

ORDER

The petition of appellees for rehearing is granted. The case is re-decided on the petition for rehearing, the response thereto, and the briefs and record previously filed in this court. The opinion of this court reported at 3 F.3d 306 is hereby withdrawn, and the attached opinion is hereby adopted.

OPINION

CANBY, Circuit Judge:

In this case, we must decide whether bid-rigging and anti-trust claims brought by a trustee on behalf of a bankrupt estate are barred by the res judicata effect of a bankruptcy court's sale order.

BACKGROUND

International Nutronics, Inc., the estate in bankruptcy, was in the business of sterilizing medical instruments and other equipment by gamma radiation. The sterilization process involved the use of cobalt-60, an isotope of cobalt. Cobalt-60 is expensive and difficult to acquire. It is highly radioactive, decaying rapidly and losing its value as a source of gamma radiation. It poses significant health risks.

At the time it filed for bankruptcy, Nutronics was in possession of two quantities of partially decayed cobalt-60. One was located at Nutronics' facility in Irvine, California; the other, at Nutronics' facility in Palo Alto, California.

In November 1987, plaintiff-appellant Robertson, Nutronics' Trustee in bankruptcy, solicited bids for the cobalt-60. Defendant-appellees Isomedix and Radiation Sterilizers, Inc. (RSI), competitors in the radiation sterilization business, submitted separate bids. Isomedix offered to pay seventy cents per curie,[1] or about $600,000, for the Irvine cobalt-60. RSI offered to buy the Irvine cobalt-60 for sixty-five cents per curie, curies to be measured by the isotope's radioactivity at the time of delivery three months later. RSI subsequently amended its bid, offering to pay 102% of the amount any competing bidder offered. Neither Isomedix nor RSI offered to purchase the Palo Alto cobalt-60.

Robertson rejected both offers. He subsequently asked Isomedix and RSI to extend new bids. Having learned that they had been the only bidders, Isomedix and RSI then notified Robertson that they had formed a joint venture to purchase and remove both supplies of cobalt-60 for $350,000. After Robertson rejected this bid, Isomedix and RSI increased their joint bid by $14,000.

Robertson accepted the joint bid and sought from the bankruptcy court an order approving the sale. In neither his letter of acceptance nor his request for a bankruptcy sale order did Robertson express objections to the joint venture. The court issued an order unconditionally confirming the sale.

About twenty-two months later, Robertson filed an adversary proceeding in the bankruptcy court, Isomedix and RSI as codefendants. The parties agreed to withdraw the reference to bankruptcy court, and the proceeding returned to district court. Alleging that the joint venture constituted an unlawful combination, the complaint sought relief under 11 U.S.C. § 363(n) and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2.

[1]A curie is a unit of radioactivity that measures a specific number of disintegrations per second.

The defendants moved for summary judgment, asserting that the claims were barred under the doctrine of res judicata. The district court granted the motion.

ISSUES ON APPEAL

Robertson challenges the district court's grant of summary judgment, contending that the doctrine of res judicata does not foreclose him from seeking damages under 11 U.S.C. § 363(n) or from bringing an action under sections 1 and 2 of the Sherman Act.

DISCUSSION

I. DOES THE RES JUDICATA EFFECT OF BANKRUPTCY COURT'S SALE ORDER FORECLOSE THE TRUSTEE FROM BRINGING AN ACTION TO AVOID A SALE UNDER 11 U.S.C. § 363(n)?

[1] Section 363 of the Bankruptcy Code defines the trustee's rights and powers of sale over the assets of the bankrupt estate. Subsection (n) provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover [attorney fees and expenses].

11 U.S.C. § 363(n) (1993). The statute also provides that the court may award punitive damages against any party who enters a sale price agreement "in willful disregard of this subsection." *Id.*

[2] We agree with Trustee Robertson that the bankruptcy court's sale order does not bar him from asserting a claim

under section 363(n). In *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991), we held that section 363(n) is a "statutory exception to the finality of bankruptcy sale orders for res judicata purposes."[2] *Id.* at 917. The *Intermagnetics* holding recognizes that to rule that the res judicata effect of a sale order forecloses the trustee from asserting a claim under section 363(n) "would render meaningless the ability of the bankruptcy trustee to 'avoid a sale' under § 363(n)." *Id.*[3]

The bankruptcy and Article III courts have traditionally possessed the authority to set aside sale orders in bankruptcy cases where the sale is "tinged with fraud, error, or similar defects which would in equity affect the validity of any private transactions" and when "compelling equities outweigh the interests in finality." *In re CADA Invs., Inc.*, 664 F.2d 1158, 1162 (9th Cir. 1981). By giving the Trustee the right to avoid a sale if the sale price was arrived at through bid-rigging, section 363(n) supplements the general powers of the court to avoid a sale. 2 Lawrence P. King, et al., *Collier on Bankruptcy*, ¶ 363.14 (Lawrence P. King, ed. 15th ed. 1993).

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[2]*Intermagnetics* was decided about a month after the district court issued the summary judgment order in this case.

[3]According to the appellees, *Intermagnetics* is distinguishable from the present case because the sale of Intermagnetic's assets was procured through fraudulent warranties and fraud upon the court. We disagree. There were three separate and independent grounds for the *Intermagnetics* court's ruling. That the bankruptcy court had conditioned the sale on representations that turned out to be fraudulent was one ground for reversing the summary judgment order. That the buyers had committed fraud upon the bankruptcy court was a second ground for avoiding the sale. That, in granting summary judgment in favor of the buyers, the district court had "failed to address the Trustee's bid-rigging claim under 11 U.S.C. § 363(n)" was a third and separate ground for reversing the district court's judgment. The facts that fraud had been committed and that the bankruptcy court's sale order was conditional did not figure into the *Intermagnetics* court's interpretation of section 363(n). *Intermagnetics*, 926 F.2d at 917.

II. IS THE TRUSTEE'S ACTION PURSUANT TO 11 U.S.C. § 363(n) BARRED BY THE LIMITATIONS PROVISIONS OF FED. R. CIV. P. 60(b)?

Section 363(n) is not, however, a wholly independent exception to the rules of finality. The Federal Rules of Bankruptcy Procedure provide that — with certain exceptions not applicable here — Rule 60 of the Federal Rules of Civil Procedure governs cases under the Bankruptcy Code. Fed. R. Bankruptcy P. 9024, 11 U.S.C. § (1984); *see also id.* advisory committee's note (stating that "all orders of the bankruptcy court are subject to Rule 60 Fed.R.Civ.P."); *CADA*, 664 F.2d at 1161 (noting that bankruptcy court's equitable power to set its orders aside "is now formalized in Bankruptcy Rule 924, which makes Federal Rules of Civil Procedure 60 applicable to bankruptcy cases").

[3] Rule 60(b) provides six sets of circumstances under which a district court may relieve a party from a final judgment or order. The Trustee's claim under section 363(n) can be characterized only as a motion under clause 3 of Rule 60(b), permitting relief for "fraud . . . misrepresentation, or other misconduct of an adverse party." Rule 60(b) imposes a one-year limitations period on such motions. The Trustee did not file a § 363(n) claim until twenty-two months after the bankruptcy court issued the sale order; therefore, the claim is time-barred.

[4] Accordingly, while we reject the district court's determination that the res judicata effect of the bankruptcy court's sale order barred the Trustee from bringing a claim under section 363(n), we affirm the district court's dismissal of the § 363(n) claim.

III. DOES THE RES JUDICATA EFFECT OF BANKRUPTCY COURT'S SALE ORDER FORECLOSE THE TRUSTEE FROM BRINGING THE ANTITRUST CLAIMS?

The doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the same parties or their privies. *In re Jenson*, 980 F.2d 1254, 1256 (9th Cir. 1992). "Res judicata bars all grounds for recovery that *could have been asserted*, whether they were or not, in a prior suit between the same parties on the same cause of action." *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992) (emphasis added).

The Trustee argues that the antitrust claims could not have been asserted in the sale order proceeding, because antitrust actions do not fall within the bankruptcy court's jurisdiction. The bankruptcy court has jurisdiction to entertain cases arising under the Bankruptcy Code and "core proceedings arising under title 11." 28 U.S.C. § 157 (Supp. 1993). Core proceedings are "matters concerning the administration of the estate" and rights created by Chapter 11. *Id.*; *see also In re Mankin*, 823 F.2d 1296, 1299-1307 (9th Cir. 1987) (discussing distinction between core and non-core issues), *cert. denied*, 485 U.S. 1006 (1988). The Trustee contends that the antitrust action against Isomedix and RSI could not, by these standards, be a core proceeding. Isomedix and RSI, on the other hand, contend that the antitrust claim would qualify as "core" because it arose out of a post-petition contract entered by the trustee in the course of administering the debtor's estate. *See, e.g., In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987); *cf. In re Eastport Associates*, 935 F.2d 1071, 1077 n.4 (9th Cir. 1991) (finding it unnecessary to reach question whether to adopt other circuits' expansive view of core jurisdiction regarding post-petition contracts).

[5] We need not decide whether Robertson's antitrust claim would have qualified as a core proceeding, a determination to

be made in the first instance by the bankruptcy court. *See* 28 U.S.C. § 157(b)(3). Even if we assume, without deciding, that the antitrust claim is non-core, it nevertheless could have been asserted in the bankruptcy court. The bankruptcy court may hear non-core matters that are "related to a case under Title 11." 28 U.S.C. § 157(c)(1). Although the bankruptcy court does not have power to render a decision in non-core matters, the claim will be decided. The bankruptcy court may submit proposed findings of fact and conclusions of law, which the district court reviews de novo. *Id.*; *In re Mann*, 907 F.2d 923, 926 (9th Cir. 1990). Or the reference can be withdrawn when the claim is made, and the matter decided from the beginning by the district court (a procedure that was in fact followed when the adversary complaint now the subject of this appeal was filed in bankruptcy court). Thus the claim could have been asserted at the time of the proceeding confirming sale, and this opportunity is sufficient to satisfy that requirement of the doctrine of res judicata. *See Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 483 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993). There is accordingly no structural obstacle to a core proceeding's having a preclusive effect on a later non-core claim. *Id.*; *see also Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (giving preclusive effect to core proceeding and barring lender liability claim); *Matter of Met-L-Wood Corp*, 861 F.2d 1012, 1016-17 (7th Cir. 1988) (order confirming sale of assets preclusive of bid-rigging and RICO claims), *cert. denied*, 490 U.S. 1006 (1989).

It is true that the Fifth Circuit has twice ruled that core proceedings could not be given preclusive effect upon later non-core claims. *See Latham v. Wells Fargo Bank*, 896 F.2d 979, 983 (5th Cir. 1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990). With that position we respectfully disagree, in part because it does not take account of the fact that a non-core claim can be asserted in bankruptcy court, even though final decision will take place in district court. *See Sanders*, 973 F.2d at 483. Moreover, a recent Fifth Circuit

decision casts some doubt on the continuing vitality of the *Latham* rule. *See Matter of Baudoin*, 981 F.2d 736, 741 & n.10 (5th Cir. 1993).

Finally, the Trustee argues that res judicata does not apply because the causes of action were not the same. The bankruptcy court's order confirming the sale of cobalt-60 was a routine and perfunctory matter, according to the Trustee, and was far too narrow in scope to constitute the same cause of action as the antitrust claims now being pursued. This argument is not without force, but ultimately we reject it.

Here the Trustee bases his present antitrust claim on collusive behavior of Isomedix and RSI that was known to him at the time he sought confirmation of the sale, and, indeed, the "collusion" was apparent on the face of the bid. If the joint bid was unduly low because of unlawful collusion, and that fact was known to the trustee at the time, then it should have been brought to the attention of the bankruptcy court. There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate. Thus this proceeding confirming the sale was a perfunctory and narrow one only because the Trustee chose not to make it otherwise.

Narrow or not, it seems clear that a bankruptcy court's order confirming a sale has preclusive effects. If the bankruptcy court's confirmation of the sale were not ordinarily res judicata with regard to matters of collusive bidding, there would have been no need for Congress to enact section 363(n). That statute, as we have seen, permits the trustee to avoid a sale "if the sale price was controlled by an agreement among potential bidders." 11 U.S.C. § 363(n). This provision is "a statutory *exception* to the finality of bankruptcy sale orders for res judicata purposes." *Intermagnetics*, 926 F.2d at 917 (emphasis added). Having failed to avail himself of this exception in a timely fashion, the Trustee is bound by the res judicata effect that otherwise applies.

The only remaining question, then, is whether the causes of action are the same. Factors that we consider in determining whether successive suits involve the same cause of action are:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Clark v. Bear, Stearns & Co., 966 F.2d at 1320. Factors (1), (2) and (4) militate strongly in favor of preclusion, and factor (3) is at worst neutral.[4] The rights of Isomedix and RSI to their purchase at the agreed price would clearly be impaired or destroyed by a successful antitrust recovery. "The suit is a thinly disguised collateral attack on the judgment confirming the sale." *Met-L-Wood*, 861 F.2d at 1018 (referring to bid-rigging and RICO claims, among others). The evidence of unlawful collusion that, if it existed, ought to have been brought forward at the confirmation hearing is the same evidence that will form the foundation of the antitrust claim. And, finally, the sale confirmation and the antitrust claim unquestionably arise out of the same transaction, and this is the most important factor of all. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982).

[6] Thus three of the *Bear Stearns* factors apply easily. The other, "whether the two suits involve infringement of the same right," is harder to apply because the sale confirmation

[4]The absence of one factor would not dictate a result in favor of the Trustee. Weighing of the four factors is not a mathematical exercise, and no single factor is automatically decisive. *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 n.7 (9th Cir. 1982).

is not easily characterized as involving infringement of a right. But the Trustee's argument now is that the sale itself was an antitrust injury; the sale price was unduly low because of an antitrust violation. The sale may therefore be viewed as infringing the same right that is the basis of the antitrust claim, and that infringement could have been asserted in the confirmation hearing. We conclude, therefore, that in light of all of the *Bear Stearns* factors, the antitrust claim constitutes the same cause of action for res judicata purposes as that decided by the order confirming the sale. The district court was correct in ruling that it was barred.

CONCLUSION

The district court erred in ruling that the Trustee's claim under section 363 is precluded under the doctrine of res judicata. Section 363 creates an exception to res judicata that permits the Trustee to seek to avoid the sale after the bankruptcy court orders or confirms a sale. However, the Trustee's motion under section 363 is time barred by Rule 60(b) of the Federal Rules of Civil Procedure.

The Trustee's antitrust claims are barred by *res judicata,* because they constitute the same cause of action for preclusion purposes, and they could have been asserted in the bankruptcy court at the time confirmation of the sale was sought.

Accordingly, we affirm the district court's judgment dismissing the section 363(n) and the antitrust claims.

AFFIRMED.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: INTL NUTRONICS, INC.,
Debtor.

JEROME ROBERTSON, Trustee
Chapter 7 Trustee of International Nutronics, Inc.,
Plaintiff-Appellant,

v.

ISOMEDIX, INC., a Delaware corporation; RADIATION STERILIZERS, INC., a California corporation individually and as joint venturers,
Defendants-Appellees.

No. 91-15253
D.C. No. CV-90-02855-VRW
OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
April 12, 1993—San Francisco, California

Filed August 10, 1993

Before: William C. Canby, Jr., and Melvin Brunetti, Circuit Judges, and Stephen V. Wilson,* District Judge

Opinion by Judge Canby

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*Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Res Judicata/Bankruptcy

The court of appeals affirmed in part and reversed in part a judgment of the district court. The court held that the res judicata effect of a sale order by the bankruptcy court did not foreclose the estate trustee's antitrust action for unlawful combination against bidders in the sale.

Appellant Jerome Robertson, the trustee in bankruptcy of debtor International Nutronics, a firm that sterilized equipment by gamma radiation, solicited bids for those quantities of partially decayed cobalt-60, an expensive and difficult to acquire radioactive isotope used as a source of gamma radiation, in the possession of Nutronics. Appellees Isomedix, Inc., and Radiation Sterilizers, Inc., each independently bid between approximately $550,000 and $600,000, but Robertson rejected both offers, informing them that they were the only bidders and requesting new bids. Isomedix and Radiation formed a joint venture and offered $364,000 for all the cobalt-60. Robertson accepted the joint bid and the bankruptcy court unconditionally confirmed the sale.

Twenty-two months later, Robertson sued Isomedix and Radiation in district court, alleging that the joint venture constituted an unlawful combination and seeking relief under the Bankruptcy Code and the Sherman Act. The court gave summary judgment for Isomedix and Radiation on grounds of res judicata. Robertson appealed.

[1] The sale order did not bar Robertson's action to avoid the sale on grounds of bid-rigging under the provisions of the Bankruptcy Code, [2] which only supplemented the traditional general power of both the bankruptcy and the Article III courts to set aside bankruptcy sale orders for fraud or error when compelling equities outweighed the interests of finality.

[3] However, Federal Rule of Civil Procedure 60(b) imposed a one-year limit on motions for relief from fraud, which barred Robertson's action under the Code brought twenty-two months after the bankruptcy court's order.

[4] The antitrust claim could not have been asserted in the bankruptcy sale proceeding because it was not a core matter concerning the administration of the bankruptcy estate or rights created by Chapter 11, and the bankruptcy court was therefore not empowered to render a decision therein. [5] The fact that the antitrust claim would not have arisen but for the bankruptcy sale proceeding did not mean that the claim arose *under* the Code. [6] Because the claim could not be decided by the bankruptcy court, it was not foreclosed by the res judicata effect of that court's sale order.

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OPINION

CANBY, Circuit Judge:

In this case, we must decide whether bid-rigging and antitrust claims brought by a trustee on behalf of a bankrupt estate are barred by the res judicata effect of a bankruptcy court's sale order.

BACKGROUND

International Nutronics, Inc., the estate in bankruptcy, was in the business of sterilizing medical instruments and other equipment by gamma radiation. The sterilization process involved the use of cobalt-60, an isotope of cobalt. Cobalt-60 is expensive and difficult to acquire. It is highly radioactive, decaying rapidly and losing its value as a source of gamma radiation. It poses significant health risks.

At the time it filed for bankruptcy, Nutronics was in possession of two quantities of partially decayed cobalt-60. One was located at Nutronics's facility in Irvine, California; the other, at Nutronics's facility in Palo Alto, California.

In November 1987, plaintiff-appellant Robertson, Nutronics's Trustee in bankruptcy, solicited bids for the cobalt-60. Defendant-appellees Isomedix and Radiation Sterilizers, Inc. (RSI), competitors in the radiation sterilization business, submitted separate bids. Isomedix offered to pay seventy cents per curie,[1] or about $600,000, for the Irvine cobalt-60 and to remove the Palo Alto cobalt-60 at the risk and expense of the bankrupt estate. RSI offered to buy the Irvine cobalt-60 for sixty-five cents per curie, curies to be measured by the isotope's radioactivity at the time of delivery three months later. RSI subsequently amended its bid, offering to pay 102% of the amount any competing bidder offered. Neither Isomedix nor RSI offered to purchase the Palo Alto cobalt-60.

Robertson rejected both offers. After informing Isomedix and RSI that they were the only bidders for the isotope, Robertson asked them to extend new bids. Isomedix and RSI then notified Robertson that they had formed a joint venture to purchase and remove both supplies of cobalt-60 for $350,000.

[1]A curie is a unit of radioactivity that measures a specific number of disintegrations per second.

After Robertson rejected this bid, Isomedix and RSI increased their joint bid by $14,000.

Robertson accepted the joint bid and sought from the bankruptcy court an order approving the sale. In neither his letter of acceptance nor his request for a bankruptcy sale order did Robertson express objections to the joint venture. The court issued an order unconditionally confirming the sale.

About twenty-two months later, Robertson filed in federal district court a complaint naming Isomedix and RSI as codefendants. Alleging that the joint venture constituted an unlawful combination, the complaint sought relief under 11 U.S.C. § 363(n) and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2.

The defendants moved for summary judgment, asserting that the claims were barred under the doctrine of res judicata. The district court granted the motion.

ISSUES ON APPEAL

Robertson challenges the district court's grant of summary judgment, contending that the doctrine of res judicata does not foreclose him from seeking damages under 11 U.S.C. § 363(n) or from bringing an action under sections 1 and 2 of the Sherman Act.

DISCUSSION

I. DOES THE RES JUDICATA EFFECT OF BANKRUPTCY COURT'S SALE ORDER FORECLOSE THE TRUSTEE FROM BRINGING AN ACTION TO VOID A SALE UNDER 11 U.S.C. § 363(n)?

Section 363 of the Bankruptcy Code defines the trustee's rights and powers of sale over the assets of the bankrupt estate. Subsection (n) provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover [attorney fees and expenses].

11 U.S.C. § 363(n) (1993). The statute also provides that the court may award punitive damages against any party who enters a sale price agreement "in willful disregard of this subsection." *Id.*

[1] We agree with Trustee Robertson that the bankruptcy court's sale order does not bar him from asserting a claim under section 363(n). In *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991), we held that section 363(n) is a "statutory exception to the finality of bankruptcy sale orders for res judicata purposes."[2] *Id.* at 917. The *Intermagnetics* holding recognizes that to rule that the res judicata effect of a sale order forecloses the trustee from asserting a claim under section 363(n) "would render meaningless the ability of the bankruptcy trustee to 'avoid a sale' under § 363(n)." *Id.*[3]

---

[2]*Intermagnetics* was decided about a month after the district court issued the summary judgment order in this case.

[3]According to the appellees, *Intermagnetics* is distinguishable from the present case because the sale of Intermagnetic's assets was procured through fraudulent warranties and fraud upon the court. We disagree. There were three separate and independent grounds for the *Intermagnetics* court's ruling. That the bankruptcy court had conditioned the sale on representations that turned out to be fraudulent was one ground for reversing the summary judgment order. That the buyers had committed fraud upon the bankruptcy court was a second ground for voiding the sale. That, in granting summary judgment in favor of the buyers, the district court had "failed to address the Trustee's bid-rigging claim under 11 U.S.C. § 363(n)" was a third and separate ground for reversing the district court's judgment. The facts that fraud had been committed and that the bankruptcy court's sale order was conditional did not figure into the *Intermagnetics* court's interpretation of section 363(n). *Intermagnetics*, 926 F.2d at 917.

[2] The bankruptcy and Article III courts have traditionally possessed the authority to set aside sale orders in bankruptcy cases where the sale is "tinged with fraud, error, or similar defects which would in equity affect the validity of any private transactions" and when "compelling equities outweigh the interests in finality." *In re CADA Invs., Inc.*, 664 F.2d 1158, 1162 (9th Cir. 1981). By giving the Trustee the right to avoid a sale if the sale price was arrived at through bid-rigging, section 363(n) supplements the general powers of the court to void a sale. 2 Lawrence P. King, et al., *Collier on Bankruptcy*, ¶ 363.14 (Lawrence P. King, ed. 15th ed. 1993).

II. IS THE TRUSTEE'S ACTION PURSUANT TO 11 U.S.C. § 363(n) BARRED BY THE LIMITATIONS PROVISIONS OF FED. R. CIV. P. 60(b)?

Section 363(n) is not, however, a wholly independent exception to the rules of finality. The Federal Rules of Bankruptcy Procedure provide that — with certain exceptions not applicable here — Rule 60 of the Federal Rules of Civil Procedure governs cases under the Bankruptcy Code. Fed. R. Bankruptcy P. 9024, 11 U.S.C. (1984); *see also id.* advisory committee's note (stating that "all orders of the bankruptcy court are subject to Rule 60 F.R.Civ.P."); *CADA*, 664 F.2d at 1161 (noting that bankruptcy court's equitable power to set its orders aside "is now formalized in Bankruptcy Rule 924, which makes Federal Rules of Civil Procedure 60 applicable to bankruptcy cases").

[3] Rule 60(b) provides six sets of circumstances under which a district court may relieve a party from a final judgment or order. The Trustee's claim under section 363(n) can be characterized only as a motion under clause 3 of Rule 60(b), permitting relief for "fraud . . . misrepresentation, or other misconduct of an adverse party." Rule 60(b) imposes a one-year limitations period on such motions. The Trustee did not file 363(n) claim until twenty-two months after the bank-

ruptcy court issued the sale order; therefore, the claim is time-barred.

Accordingly, while we reject the district court's determination that the res judicata effect of the bankruptcy court's sale order barred the Trustee from bringing a claim under section 363(n), we affirm the district court's dismissal of the 363(n) claim.

III. DOES THE RES JUDICATA EFFECT OF BANKRUPTCY COURT'S SALE ORDER FORECLOSE THE TRUSTEE FROM BRINGING THE ANTITRUST CLAIMS?

The doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the same parties or their privies. *In re Jenson*, 980 F.2d 1254, 1256 (9th Cir. 1992). Res judicata bars all grounds for recovery that *could have been asserted*, whether they were or not, in a prior suit between the same parties on the same cause of action. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

[4] The antitrust claims could not have been asserted in the sale order proceeding. The bankruptcy court has jurisdiction to entertain cases arising under the Bankruptcy Code and "core proceedings arising under Title 11." 28 U.S.C. § 157 (Supp. 1993). Core proceedings are "matters concerning the administration of the estate" and rights created by Chapter 11. *Id.*; *see also In re Mankin*, 823 F.2d 1296, 1299-1307 (9th Cir. 1987) (discussing distinction between core and noncore issues), *cert. denied*, 485 U.S. 1006 (1988). Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are not core proceedings. *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir. 1986). The bankruptcy court may hear noncore matters that are "related to a case under Title 11." 28 U.S.C. § 157(c)(1). But the bank-

ruptcy court is not empowered to render a decision in noncore matters; rather, it submits proposed findings of fact and conclusions of law, which the district court reviews de novo. *Id.*; *In re Mann*, 907 F.2d 923, 926 (9th Cir. 1990). This distinction between core and noncore matters ensures that the bankruptcy courts will not encroach impermissibly in the province reserved by the Constitution to Article III courts. *Mankin*, 823 F.2d at 1300-07 (discussing *Northern Pipe Line Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

[5] The appellees urge us to adopt a "but-for" test to determine whether a proceeding is core or noncore. According to this logic, if a cause of action would not have arisen "but for" the bankruptcy case, it is within the bankruptcy court's jurisdiction. Because the antitrust action could not have arisen without the Trustee's sale of the cobalt-60, the appellees maintain, the antitrust claims constitute core matters. We reject this argument. It conflates the concepts of "arising under Title 11" and arising *because of* Chapter 11. An action that arises *because of* a bankruptcy proceeding does not necessarily arise *under* the Bankruptcy Code.

[6] The Trustee's antitrust claims are not core matters. Antitrust claims do not arise under the Bankruptcy Code and they are properly brought before an Article III court. *See Castlerock*, 781 F.2d at 162. The outcome of the Trustee's cause of action under the Sherman Act will not affect any parties' rights under the administration of the estate. Because the claims could not have been decided by the bankruptcy court, they cannot be precluded by res judicata effect of the bankruptcy court's sale order. *Cf. Latham v. Wells Fargo Bank*, 896 F.2d 979, 983 (5th Cir. 1990) (holding that lender liability claims are noncore and thus not barred by res judicata effect of bankruptcy proceedings); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990) (holding that action for RICO violations against shareholders, officers and directors of corporations that had filed for Chapter 11 reorganiza-

tion and had completed confirmation proceedings was not a core proceeding).

CONCLUSION

The district court erred in ruling that the Trustee's action is precluded under the doctrine of res judicata. Section 363 empowers the Trustee to seek to void the sale after the bankruptcy court issues a sale order. However, the Trustee's motion under section 363 is time barred by Rule 60(b) of the Federal Rules of Civil Procedure.

The Trustee's antitrust claims, on the other hand, are not barred by *res judicata*, because the bankruptcy court lacked jurisdiction to entertain the claims.

Accordingly, we affirm the district court's dismissal of the Trustee's section 363(n) claim and reverse the dismissal of the antitrust claims. In reversing the dismissal, however, we do not decide whether other affirmative defenses may preclude the Trustee from bringing the antitrust claims.

AFFIRMED IN PART; REVERSED IN PART. Each party will bear its own costs.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEROME E. ROBERTSON, Chapter 7 Trustee of International Nutronics, Inc.,	)	
Plaintiff,	)	No. C-90-2855-VRW
vs.	)	
	)	ORDER
ISOMEDIX, INC., a Delaware corporation, and RADIATION STERILIZERS, INC., a California corporation, individually and as joint ventures,	)	
Defendants.	)	

In this antitrust action, the plaintiff, trustee in bankruptcy for International Nutronics, Inc., alleges that defendants Isomedix, Inc. and Radiation Sterilizers, Inc. ("RSI") violated the antitrust and bankruptcy laws by submitting a joint bid for radioactive cobalt owned by the bankrupt estate. The joint bid was fully disclosed as such, the trustee accepted the bid on the advice of counsel, and the sale was approved by the bankruptcy court. No challenge was made to the sale before the bankruptcy court, and no appeal of the order approving sale was taken. Defendants now seek summary judgment on the grounds that this suit is a collateral attack on the bankruptcy court's order approving the sale, and is therefore barred by the doctrine of res judicata.

A cause of action is barred by res judicata if there is (1) a final judgment (2) rendered by a court with jurisdiction over the causes of action asserted (3) rendered in a suit in which the party asserting the cause of action was a party, and (4) disposes of the

subject matter of the action. A bankruptcy court order confirming a sale of the debtor's property is considered a final, appealable judgment. In re Exennium, Inc., 715 F.2d 1401 (9th Cir. 1983). The trustee was a party to the sale proceeding, and had a full opportunity to raise his objections to the sale at that time. The bankruptcy court has core jurisdiction over any action which "in any way impacts upon the handling and administration of the bankruptcy estate." In re Balboa Improv., Ltd., 99 Bankr. 966 (BAP 9 Cal. 1989). The sale of assets took place during the course of the bankruptcy proceeding and affects the debtor's ability to pay its creditors. There is no special exception for antitrust claims which would prevent them from being raised in the bankruptcy court.

Two other circuits have held that a bankruptcy court's order approving a sale of assets precludes any future suit arising out of the sale. In In re Met-L-Wood Corp., 861 F.2d 1012 (7th Cir. 1988), cert. den., Gekas v. Pipin, 490 U.S. 1006 (1989), the Seventh Circuit held that fraud and racketeering claims arising out of a collusive scheme to fix bids on a sale of the property of the estate were barred by the bankruptcy court's order approving the sale. Among other things, that order barred a bankruptcy trustee from setting aside the sale under 11 U.S.C. §363(n), the same statute the trustee seeks to use to set aside the sale in this action. See Defendants' Request for Judicial Notice, January 25, 1991. In Hendrick v. Avent, 891 F.2d 583 (5th Cir. 1990), cert. den., ___ U.S. ___, 111 S.Ct. 64 (1990), the Fifth Circuit held that claims for racketeering, securities fraud, misrepresentation and breach of fiduciary duty arising out of a bankruptcy trustee's sale of securities belonging to the estate were similarly barred. The court finds the reasoning of these cases persuasive. Summary judgment is therefore GRANTED.

IT IS SO ORDERED.

DATED: January 28, 1991

VAUGHN R. WALKER
United States District Judge

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FILED
MAR 8 1988
Paul C. Karney
U.S. District Court
San Jose, CA

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORN8IA

In re INTERNATIONAL NUTRONICS, INC., Debtor.	Case No. 586 02992-M Chapter 7

ORDER AUTHORIZING SALE OF COBALT-60 FREE AND CLEAR OF LIENS

Jerome E. Robertson, Trustee in Bankruptcy herein, having filed his Second Application for Order Authorizing Sale of Property Free and Clear of Liens ("Application") on February 5, 1988, notice of the Application having been duly given in accordance with the Order Limiting Notice and Authorizing Sale of Isotope (Palo Alto) filed herein on January 20, 1988, no objection to the request for sale having been made and good cause appearing therefor

IT IS HEREBY ORDERED:

1. The Application is hereby granted and the Trustee is hereby authorized to sell the cobalt-60 described in the Application to Radiation Sterilizers, Inc. and Isomedix Inc. in accordance with the terms of the offer set forth in the Application.

2. The Trustee may sell the cobalt-60 free and clear of the following liens:

a. Federal Tax lien filed with the Office of the Secretary of State on October 19, 1985 securing a debt in the amount of $93,191.40;

b. A lien in favor of Bank of America, NT&SA evidenced in part by a financing statement with the Office of the Secretary of State on October 31, 1979 and continued on May 3, 1984;

c. A lien in favor of Walter B. Hewlett covering "capsules containing cylindrical cobalt slugs" more specifically described in the financing statement filed with the Office of the Secretary of State on March 18, 1985 and filed again on June 27, 1985; and

d. A judgment lien in favor of John F. Mahoney and Mahoney Export Services filed April 6, 1984.

3. The liens mentioned in Paragraph 2 hereof shall be transferred to the net proceeds of the sale, if and to the extent said liens are valid, and the liens so transferred shall reattach to said proceeds in the same validity, amount and priority as they existed with respect to the cobalt-60.

4. The Trustee shall be authorized to receive and the purchaser shall be authorized to pay to the Trustee the entire proceeds of the sale. The Trustee shall hold the entire proceeds of the sale and shall make no distribution thereof absent further order of the Bankruptcy Court.

5. The Trustee is hereby authorized to execute such documents and take such other actions if they be necessary to effect the sale authorized hereby.

Dated: MAR--8 1988

/s/WARREN C. MOORE
United States Bankruptcy Judge

DATED: September 22, 1994.

Respectfully submitted,
ROSENBLUM, PARISH & ISAACS
JEFFREY J. PARISH
ANDREA J. INGRAM

By _____
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Supreme Court, U.S.
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No. 94-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re INTERNATIONAL NUTRONICS, INC.,
Debtor.

JEROME ROBERTSON, Chapter 7 Trustee of International Nutronics, Inc.,
Petitioner,

vs.

ISOMEDIX, INC., a Delaware corporation, and RADIATION STERILIZERS, INC., a California corporation, individually and as joint venturers,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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No. 94-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re INTERNATIONAL NUTRONICS, INC.,
Debtor.

JEROME ROBERTSON, Chapter 7 Trustee of International Nutronics, Inc.,
Petitioner,

vs.

ISOMEDIX, INC., a Delaware corporation, and RADIATION STERILIZERS, INC., a California corporation, individually and as joint venturers,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Petitioner, a bankruptcy trustee, sought and obtained a final order from the bankruptcy court approving his decision to sell the principal assets of the bankruptcy estate to a fully-disclosed joint venture formed by Respondents for the purpose of bidding on those assets. Petitioner chose not to raise any issues concerning the legality of the joint venture at the time he sought approval of the sale. Almost two years later, Petitioner brought this action as a core proceeding in the bankruptcy court alleging that the joint venture violated the antitrust laws, on the basis of facts that had been fully disclosed to Petitioner at the time

of the sale. Against this background, the Petition presents two questions:

1. Do principles of *res judicata* preclude Petitioner, who sought and obtained a final order approving the sale of property to Respondents, from bringing antitrust claims against Respondents arising from that sale because the claims could have been asserted in the bankruptcy court, even if they were not core claims?

2. Are Petitioner's antitrust claims, which arise from the sale by a bankruptcy trustee of the principal assets of the estate, precluded by *res judicata* because they are core proceedings within the meaning of 28 U.S.C. §157(b)(2)?

Petitioner cannot prevail unless both of those questions are decided in the negative.

STATEMENT OF THE CASE

A. The Case Below.

In June 1987, International Nutronics, Inc., ("INI") filed a Chapter 11 petition in the Bankruptcy Court for the Northern District of California. Petitioner Jerome E. Robertson was appointed trustee of INI in October 1987, and the case was converted to a Chapter 7 liquidation in January 1988.

Shortly after his appointment, Petitioner solicited bids to purchase INI's principal assets. Ultimately, he accepted the bid of a joint venture formed by Respondents Isomedix Inc. ("Isomedix") and Radiation Sterilizers, Inc. ("RSI").[1] On Petitioner's own motion, the bankruptcy court entered an order on March 8, 1988, confirming the sale of assets to the Isomedix-RSI joint venture.

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[1] Isomedix has no parent company and no subsidiaries except wholly-owned subsidiaries. RSI changed its name in March 1992 to SteriGenics International. It has no parent company, but it has two partially-owned subsidiaries, China Biotech Corporation (Taiwan) and Perkassa SteriGenics (Indonesia).

Almost two years later, Petitioner filed this action to challenge the sale. His three claims for relief alleged that the joint venture's bid violated Section 363(n) of the Bankruptcy Code, 11 U.S.C.A. § 363(n) (West 1993), and Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2 (West 1993).

Petitioner brought this action as an adversary proceeding in the bankruptcy court, and his complaint specifically alleged that all three of his claims were "core proceedings within the meaning of 28 U.S.C. §157(b)(2) and 157(b)(2)(N)."

In September 1990, the parties stipulated that the reference of the adversary proceeding to the bankruptcy court be withdrawn, and the case was transferred to the district court. Respondents then moved for summary judgment on the grounds that the order Petitioner sought and obtained from the bankruptcy court confirming the sale was *res judicata* as to all claims in the complaint.

The district court granted the motion for summary judgment. It summed up the relevant undisputed facts as follows:

> The joint bid was fully disclosed as such, the Trustee accepted the bid on the advice of counsel, and the sale was approved by the bankruptcy court. No challenge was made to the sale before the bankruptcy court, and no appeal from the order approving sale was taken.

Slip Opinion at 1, reprinted in the Appendix to Petition for Writ of *Certiorari* (the "Petition"). Based on those undisputed facts, the district court held that Petitioner's Bankruptcy Code and Sherman Act claims were barred by *res judicata*.

Petitioner appealed. Initially, the Ninth Circuit affirmed the dismissal of the claim under Bankruptcy Code §363(n), on the grounds that Petitioner had failed to seek relief from the bankruptcy court's sale order within the one-year period provided by Fed. R. Civ. P. 60(b); but it reversed the dismissal of

the antitrust claims, on the grounds that *res judicata* could not apply because such claims, as non-core proceedings, could not have been decided in the bankruptcy court. *Robertson v. Isomedix, Inc.*, 3 F.3d 306 (9th Cir. 1993), *withdrawn and replaced by* 28 F.3d 965 (9th Cir. 1994).

Respondents petitioned the Ninth Circuit for a rehearing of the portion of its ruling that reversed dismissal of the antitrust claims. The Ninth Circuit granted the petition, withdrew its original opinion, and held that the antitrust claims were barred by *res judicata*. *Robertson v. Isomedix, Inc.*, 28 F.3d 965, 969-71 (9th Cir. 1994). Upon rehearing, the Ninth Circuit held that it need not decide whether the antitrust claims were core or non-core proceedings: even assuming them to be non-core, such claims could have been asserted in the bankruptcy court pursuant to 28 U.S.C. §157(c)(1),[2] a procedure that it concluded was "sufficient to satisfy [the requirements] of *res judicata*." Id. at 969.

B. Statement of Facts.[3]

Respondents are engaged in the business of sterilizing medical devices and other products with gamma radiation. They use cobalt-60, a radioactive isotope of the element cobalt, as a source of gamma radiation. INI was engaged in the same business before it went bankrupt, and its assets included partially-decayed cobalt-60 installed at its facilities in Irvine and Palo Alto, California.

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[2] 28 U.S.C. §157(c)(1): "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."

[3] The undisputed facts are summarized in the opinion of the Ninth Circuit. 28 F.3d at 967. Record references are provided only for facts not stated in that opinion. "ER" refers to Petitioner's Excerpts of Record filed in the Ninth Circuit. "SER" refers to Respondents' Supplemental Excerpts of Record.

Beginning in November 1987, Petitioner solicited bids for INI's cobalt-60. On November 30, Isomedix submitted a bid for the cobalt-60 located at INI's Irvine facility, but declined to bid on the cobalt in Palo Alto. In December 1987, at Petitioner's request, Isomedix supplemented its bid with an offer to remove the cobalt from INI's Palo Alto facility at the risk and expense of the bankruptcy estate. (SER 8:56-57.) Isomedix explained to Petitioner that it had serious concerns about the risks of radioactive contamination at the Palo Alto facility, and that those risks far outweighed the value of the substantially-decayed cobalt located there. (SER 8:56-57.)

On December 1, 1987, RSI submitted its own, independent bid for the INI cobalt. It offered to purchase the Irvine cobalt at a lower price than Isomedix's bid and offered nothing for the Palo Alto cobalt. Because it had no immediate need for cobalt-60, however, RSI's offer was conditioned on delivery and payment three months later, which reduced the value of its bid. Two weeks later, RSI offered to pay Petitioner 102% of the amount offered by any competing bidder, subject to RSI's prior review and approval of the terms of the competing bid.

During December 1987, Petitioner discussed the bidding with both Respondents. He expressed a desire for an offer to purchase all of INI's cobalt-60 at the earliest possible date. (ER A:5; SER 8:23.)[4]

Following those discussions, on December 30, 1987, Respondents formed a joint venture to submit a bid on all the INI cobalt. On January 6, 1988, they disclosed to Petitioner that they had formed the joint venture, and they submitted a joint bid for all of the INI cobalt. Petitioner rejected the bid, but expressed no objection to the fact that Respondents were bidding as a joint venture. (SER 8:73.)

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[4] For purposes of the summary judgment motion, Isomedix and RSI chose not to contest Robertson's assertion that they knew they were the only bidders.

Petitioner then solicited another round of bids. He did not ask Respondents to bid separately. (SER 8:75-76.) The Isomedix-RSI joint venture increased its bid on January 29, 1988. The joint venture's second bid, like its first, was clearly disclosed, in writing, as a joint bid.

Before Petitioner accepted any bid, his counsel researched the legality of the joint bid by Respondents. (SER 8:38-39.) Then, on February 12, 1988, with full knowledge of the facts and with the advice of counsel, Petitioner unconditionally accepted the joint bid. In his letter accepting the bid, Petitioner, through counsel, represented to Respondents that he would seek judicial approval of the sale "for the benefit and protection of all parties involved." (SER 8:82.)

Even before accepting the bid, on February 5, 1988, Petitioner had filed a motion in the bankruptcy court to confirm the sale to the Isomedix-RSI joint venture. (ER A:7; SER 8:85-93.) That motion made no mention of any alleged illegality in the bidding process and, in fact, attached the second joint bid, fully disclosing itself as such, as an exhibit. (SER 8:90-91.)

On March 7, 1988, Petitioner filed in the bankruptcy court a request for entry of an order confirming the sale, which likewise preserved no legal objection to the joint bid. On March 8, 1988, the bankruptcy court granted Petitioner's request and entered an order confirming the sale to Respondents. Promptly following entry of that order, the joint venture paid Petitioner over $350,000 for the INI cobalt and, at the risk and expense of Respondents, removed the cobalt sources from INI's premises. (SER 8:21-22, 24.)

In April 1988, after the INI cobalt sources were removed and Petitioner had obtained the full benefit of the joint venture's performance, his counsel conducted further research into the possibility of filing the present action. (SER 8:46-47.) Nevertheless, Petitioner did not file suit until January 5, 1990, almost two years after the bankruptcy court sale order.

SUMMARY OF THE ARGUMENT

Petitioner urges the Court to review the decision below and to reverse the dismissal of his antitrust claims, arguing that the bankruptcy sale order was so "ministerial," "routine," and "perfunctory" as to be unworthy of full *res judicata* status. That argument ignores the rule recognized in every circuit that a bankruptcy court order authorizing the sale of property is a final judgment on the merits. It would require this Court to create a new classification of so-called "routine" orders of doubtful finality and effect, which would disrupt settled precedent and practice in the administration of bankruptcy estates.

Although Petitioner asserts that the Ninth Circuit's decision conflicts with precedents in several other circuits, analysis of the cases demonstrates that the Ninth Circuit is in accord with the most recent cases in those circuits.

Finally, for Petitioner to prevail this Court would have to reach and decide an issue on which the Ninth Circuit expressly reserved decision — namely, whether Petitioner's post-petition antitrust claims are core or non-core proceedings — and to adopt a highly restrictive definition of core jurisdiction.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ARGUMENT IS BASED ON A CLASSIFICATION OF "ROUTINE" BANKRUPTCY COURT SALE ORDERS THAT CONFLICTS WITH SETTLED PRECEDENT AND PRACTICE IN ALL THE CIRCUITS.

Petitioner's disdain for the bankruptcy court's order authorizing the sale of INI's principal assets — an order Petitioner himself obtained, purportedly "for the benefit and protection of all parties involved" — is revealed in the summary of his argument:

> Such orders are a matter of routine and are granted on a *perfunctory* basis. The sole purpose and effect

> of such orders is to dispose of the property for cash, giving the buyer title clear of encumbrances. The idea that there was an opportunity to litigate anything prior to the issuance of the order is a *legal fiction*.

Petition at 5 (emphasis supplied).

Petitioner's position is fundamentally inconsistent with the rule recognized in every circuit that an order issued by a bankruptcy court authorizing or confirming the sale of assets is a "final order."[5]

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[5] *First Circuit: In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993) (finality assumed without discussion).

Second Circuit: In re Russo, 762 F.2d 239 (2d Cir. 1985) (finality assumed without discussion).

Third Circuit: In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 144 (3rd Cir. 1986).

Fourth Circuit: Willemain v. Kivitz, 764 F.2d 1019 (4th Cir. 1985) (finality assumed without discussion).

Fifth Circuit: Hendrick v. Avent, 891 F.2d 583 (5th Cir. 1990).

Sixth Circuit: Stephens Industries, Inc. v. McClung, 789 F.2d 386, 388 (6th Cir. 1986).

Seventh Circuit: In re Sax, 796 F.2d 994, 996-97 (7th Cir. 1986).

Eight Circuit: In re Bestmann, 720 F.2d 484 (8th Cir. 1983) (assuming finality with respect to order awarding proceeds of sale).

Ninth Circuit: In re Victoria Station, Inc., 840 F.2d 682, 1402-03 (9th Cir. 1988).

Tenth Circuit: In re Bel Air Associates, Ltd., 706 F.2d 301, 304-05 (10th Cir. 1983) (finality assumed without discussion).

Eleventh Circuit: In re The Charter Co., 829 F.2d 1054, 1055 (11th Cir. 1987) (finality assumed without discussion).

D.C. Circuit: In re Magwood, 785 F.2d 1077 (D.C. Cir. 1986) (finality assumed without discussion).

The preclusive effect of final orders has long been recognized in *res judicata* jurisprudence. *Reed v. Allen*, 286 U.S. 191, 198-99 (1932). The parties to such orders cannot debase them simply by pursuing them in a "routine" or "perfunctory" fashion. As the Ninth Circuit pointed out in rejecting Petitioner's argument:

> There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate. Thus, this proceeding confirming the sale was a perfunctory and narrow one only because the Trustee chose not to make it otherwise.

28 F.3d at 970.[6]

Petitioner knew full well that he was accepting, and seeking judicial approval of, a joint bid. His counsel had already investigated the legality of the joint bid at the time Petitioner accepted the bid and sought court approval of the sale. Thus, Petitioner could have raised his claims at the hearing on the order approving sale. Had he chosen to do so, he could have asked the bankruptcy court for conditional approval of the sale, reserving his rights to investigate and pursue whatever claims he believed he had arising from the joint bid. *In re Intermagnetics, Inc.*, 926 F.2d 912, 915-916 (9th Cir. 1991) (conditional order approving sale); *Hendrick v. Avent*, 891 F.2d 583, 584 (5th Cir. 1990) (sale confirmed but special counsel authorized to investigate circumstances of sale).

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[6] See also *Metlyn Realty Corp. v. Esmark*, 763 F.2d 826, 830 (7th Cir. 1985), where the court noted:

> The rule that the final judgment governs the future induces the parties to focus all of their efforts in a single proceeding. If they know that the judgment will establish their rights once and for all, they will bring to bear the information and energies necessary to produce an informed decision. If they believe that they can have a second try, they are more likely to skimp the first time around, and as a result the judicial process will become less accurate.

Petitioner did no such thing. Nor did he return to the bankruptcy court within the one-year period allowed by Fed. R. Civ. P. 60(b)(3) to reopen the order based upon alleged "misconduct of an adverse party."

Having failed to assert his claims at the bankruptcy sale hearing and for almost two years thereafter, Petitioner asks this Court to save him from his own deliberate delay by adopting a rule for so-called "routine" orders that would vitiate the universally-recognized finality of bankruptcy sale orders. Such a rule would disrupt settled practice in the bankruptcy courts and in the administration of bankruptcy estates, and would have serious adverse consequences for both debtors and creditors:

> Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms — and the principal losers . . . will be unsecured creditors.

In re Met-L-Wood, 861 F.2d 1012, 1019 (7th Cir. 1988), *cert. denied sub nom. Gekas v. Pipin*, 490 U.S. 1006 (1989).

II. TO THE EXTENT THERE ARE CONFLICTING PRECEDENTS, THEY ARE BEING RESOLVED IN THE CIRCUITS.

Petitioner contends that "the Ninth Circuit is in conflict with the law in the Second, Fifth, Sixth and Seventh Circuits" on the issue of whether a bankruptcy sale order bars subsequent non-core claims. (Petition at 7.) In fact, the Ninth Circuit's decision is supported by cases in each of those circuits, and, to the extent there are inconsistent panel decisions within any of the circuits, such inconsistencies are being resolved within the circuits themselves.

A. The Law in the Sixth Circuit Directly Supports the Decision Below.

The decision below (28 F.3d at 969-70) cites and relies on the opinion of the Sixth Circuit in *Sanders Confectionery Products*,

Inc. v. Heller Financial, Inc., 973 F.2d 474 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1046 (1993). There, the Sixth Circuit held that lender liability, fraud and RICO claims asserted by parties related to a debtor against a creditor, the creditor's lawyers and the debtor's bankruptcy trustee were precluded by a prior order of the bankruptcy court confirming the debtor's plan of reorganization. A principal issue was whether the bankruptcy court's order was *res judicata* as to both core and non-core claims.

The Sixth Circuit reasoned that:

> While the bankruptcy court could not make a final decision in a non-core proceeding, absent the consent of the parties, it could hear the matter and refer it to the district court. Through its bankruptcy jurisdiction, the district court could decide the claim, allowing for a correct adjustment of the relations between all of the parties.

Sanders Confectionery, 973 F.2d at 483.

Based on that reasoning, the Sixth Circuit concluded that a final order of the bankruptcy court was *res judicata* as to both core and non-core matters. *Id.*[7] Here, the Ninth Circuit adopted the same reasoning to reach the same result. 28 F.3d at 969-70. Thus, the Ninth and Sixth Circuits are not in conflict, but in accord.

B. The Law in the Second Circuit Also Supports the Decision Below.

The decision below (28 F.3d at 970) also relies on the opinion of the Second Circuit in *Sure-Snap Corp. v. State Street*

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[7] By focusing on the plaintiffs' opportunity to *assert* their non-core claims in the bankruptcy court, subject to ultimate *decision* by the district court, the Sixth Circuit's analysis avoids any Constitutional issue under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Bank & Trust Co., 948 F.2d 869 (2d Cir. 1991). There, the Second Circuit held that whether or not claims constitute core proceedings "has no bearing on their preclusion" by a final order of a bankruptcy court. 948 F. 2d at 873. That is precisely the holding of the Ninth Circuit as to which Petitioner seeks *certiorari*. Thus, the Second and Ninth Circuits are likewise in accord.[8]

Petitioner finds a "conflict" not in the holding of *Sure-Snap* but in its *dicta*. The Second Circuit held that lender liability claims against certain banks were barred by the order confirming the debtor's plan of reorganization, and observed that the claims would not have been barred by an earlier order of the bankruptcy court that upheld the validity of the banks' liens. 948 F.2d at 874. The court noted that the scope of the earlier proceeding was narrowly focused on the validity of the liens and did not put at issue "the amount of repayment the banks were entitled to." *Id.* That amount was, however, put at issue by the reorganization plan, so the failure to raise lender liability claims at the confirmation hearing precluded the debtor from raising them in later proceedings. *Id.* at 876.

Likewise here, Petitioner's motion to confirm the sale of INI's cobalt to Respondents put at issue whether the joint bid was in the best interests of the estate. As the Ninth Circuit pointed out, "[i]f the joint bid was unduly low because of unlawful collusion . . . [that fact] should have been brought to the attention of the bankruptcy court" at the sale hearing. 28 F.3d at 970. That conclusion is consistent with the Second Circuit's holding in *Sure-Snap* that the debtor should have "raise[d] these [lender liability] claims (if valid)" at the plan confirmation hearing so the court could make a fully-informed "disposition of Sure-Snap's assets or schedule of payments." 948 F.2d at 876.

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[8] Petitioner's implication that the "the Sixth [sic: should be Second] Circuit" characterized the debtor's claims as "non-core" (Petition at 11) is incorrect. The Second Circuit held that whether the debtor's claims were core or non-core was irrelevant to its disposition of the appeal (as did the Ninth Circuit here), and "would in any case have been a question reserved for the bankruptcy judge to determine." 948 F.2d at 873.

C. The Law in the Fifth Circuit is Consistent With the Decision Below.

The Ninth Circuit declined to follow two cases from the Fifth Circuit, *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990) and *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990), insofar as they held "that core proceedings could not be given preclusive effect upon later non-core claims." 28 F.3d at 970. The Ninth Circuit noted, however, that a more recent Fifth Circuit decision, *In re Baudoin*, 981 F.2d 736, 741 (5th Cir. 1993) "casts some doubt on the continuing vitality of the *Latham* rule." *Id.*

In fact, *Latham* and *Howell Hydrocarbons* appear to be anomalies, even in the Fifth Circuit. Earlier decisions in that circuit held that bankruptcy court orders confirming sales of property were *res judicata* with respect to various federal and state law claims arising from or related to the sales. *Hendrick v. Avent*, 891 F.2d 583 (5th Cir. 1990) (RICO, securities fraud and common law claims); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984) (common law claims). Those cases did not depend on any analysis of whether the precluded claims were core or non-core; nor did they question the finality and preclusive effect of bankruptcy court sale orders.

Cases decided after *Latham* and *Howell Hydrocarbons* have also minimized the distinction between core and non-core claims in the *res judicata* analysis. In *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992) and *In re Howe*, 913 F.2d 1138 (5th Cir. 1990), the Fifth Circuit held that confirmed plans of reorganization precluded subsequent lender liability claims, without even considering whether such claims were core proceedings. Indeed, *Eubanks* cited with approval the decision of the Second Circuit in *Sure-Snap*. 977 F.2d at 171-72.

Most recently, in *In re Baudoin* the Fifth Circuit held that bankruptcy court sale orders were *res judicata* as to subsequent lender liability claims. 981 F.2d at 741-42. The court held that the lender liability claims were core matters, but expressly stated

"we need not decide whether it must be so in order to satisfy . . . our *res judicata* analysis." Id. at 741. In that context, the court specifically limited *Latham* to its facts, stating "[n]or do we read [*Latham*] to hold that bankruptcy jurisdiction must always be core in order to be 'competent' for *res judicata* purposes." Id. at 741, n. 10.

Baudoin also reiterated the Fifth Circuit's previous holdings in *Southmark* and *Hendrick* that bankruptcy sale orders are entitled to full *res judicata* status. 981 F.2d at 742. In doing so, it distinguished *D-1 Enterprises, Inc. v. Commercial State Bank* 864 F.2d 36, 39 (5th Cir. 1989) as dealing with an expedited proceeding to lift a stay, in which lender liability and other "indirect" defenses could not have been asserted.[9] Thus, Petitioner's reliance on *D-1 Enterprises* for the proposition that bankruptcy sale orders are "routine" matters of limited preclusive effect (Petition at 9) misreads *D-1 Enterprises* itself and has been rejected in the very circuit that decided that case.

D. The Law in the Seventh Circuit Can Be Reconciled With the Decision Below.

Three decisions from the Seventh Circuit are relevant.

The first, chronologically, is *In re Met-L-Wood*, where the Seventh Circuit held that a bankruptcy court order confirming the sale of property precluded subsequent RICO and other claims arising from the sale. 861 F.2d at 1016-18. The court acknowledged the *res judicata* effect of the bankruptcy court sale order, *id.* at 1016, and did not consider it necessary to decide whether the claims precluded by that order were core or non-core. Thus, *Met-L-Wood* directly supports the holding of the Ninth Circuit and is appropriately relied on in its opinion. 28 F.3d at 970.

The second relevant decision in the Seventh Circuit is *Barnett v. Stern*, on which Petitioner relies. There, the court held that

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[9] *D-1 Enterprises* itself cited *Southmark* with approval as illustrating the preclusive effect of a bankruptcy court sale order. 864 F.2d at 39.

a bankruptcy trustee's non-core claim against the debtor's son was not precluded by a prior order of the bankruptcy court declaring certain assets property of the estate. The court reasoned that the RICO claim would not have been a core proceeding, and therefore could not have been asserted in the bankruptcy court. 909 F.2d at 978-82. The court appears to have overlooked its own decision to the contrary in *Met-L-Wood*, relying instead on the Fifth Circuit's reasoning in *Howell Hydrocarbons*.

The most recent decision of the Seventh Circuit is *In re Kroner*, 953 F.2d 317 (7th Cir. 1992), where the court held that a bankruptcy trustee's non-core claims *were* barred by a prior order of the bankruptcy court. The court acknowledged its holding in *Barnett* that bankruptcy court orders are generally not *res judicata* with respect to non-core claims, but held that *Barnett* did not apply because the trustee in *Kroner* had filed his non-core claim in the bankruptcy court and thereby consented to that court's jurisdiction. 953 F.2d at 320.[10] *Kroner* expressly limits *Barnett* to a rule that "a bankruptcy court's judgment in a core proceeding . . . has no effect on a party who brings a subsequent non-core action *in the district court*." 953 F.2d at 320 (emphasis supplied).

Thus, the law in the Seventh Circuit, as limited by *Kroner*, supports the decision of the Ninth Circuit in this case. Petitioner commenced this action in the bankruptcy court, thereby consenting to — indeed invoking — its jurisdiction.[11] Accordingly, he is bound by the *res judicata* effect of the bankruptcy court's prior order confirming the sale to Respondents.

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[10] The court also held that the trustee had waived any argument based on *Barnett* by failing to raise it in the courts below. *Id.*

[11] Furthermore, as previously noted, the Trustee pleaded that his antitrust claims were within the bankruptcy court's core jurisdiction.

The fact that the parties agreed to withdraw the reference to the bankruptcy court does not imply that the bankruptcy court lacked jurisdiction, since withdrawal under 28 U.S.C. §157(d) is appropriate whether or not the

(Footnote continued)

E. Inconsistent Panel Decisions are Being Reconciled Within the Circuits and the Ninth Circuit's Decision is Consistent With the Most Recent Holdings in the Other Circuits.

As the foregoing discussion demonstrates, the decision of the Ninth Circuit is entirely consistent with the precedents in the Second and Sixth Circuits. The conflicting precedents in the Fifth and Seventh Circuits have been limited by those courts themselves, and the most recent decisions in the Fifth and Seventh Circuits support the decision of the Ninth Circuit. Therefore, there is no need for this Court to intervene to resolve conflicts in the circuits.

III. PETITIONER CANNOT PREVAIL UNLESS THIS COURT DECIDES THAT HIS POST-PETITION ANTITRUST CLAIMS ARE NOT MATTERS OF "CORE" JURISDICTION, A CONCLUSION NOT REACHED BY THE COURT BELOW AND INCONSISTENT WITH WELL-REASONED PRECEDENTS.

Petitioner's argument depends not only on a debasement of bankruptcy court sale orders, but also on a determination that antitrust claims arising directly from the liquidation of the bankruptcy estate are non-core proceedings. The Ninth Circuit expressly declined to decide whether such claims are core or non-core, holding that they were precluded here in either event by Petitioner's ability to assert them in the bankruptcy court. 28 F.3d at 969.

In order for Petitioner to prevail in this case, however, the Court would have to reach the issue of whether such claims are core or non-core matters, since Petitioner's position depends upon

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bankruptcy court has jurisdiction. See 1 Collier on Bankruptcy 3.01 [2][e] at 3-62 (L.P. King ed., 15th ed. 1993) (citing cases) and *Burger King Corp. v. B-K of Kansas*, 64 B.R. 728, 732 (D. Kan. 1986) ("Section 157(d) does not mention the core/non-core distinction, and withdrawal of reference is not dependent on the classification of a claim.")

a determination that they are non-core. To grant Petitioner any relief, therefore, the Court would have to adopt an extremely narrow view of core jurisdiction that is inconsistent both with well-reasoned precedents and with the position Petitioner himself took in his complaint.

Under section 157(b)(2) of the Bankruptcy Code,

> "[c]ore proceedings include. . ."
>
> (A) matters concerning the administration of the estate; [and]
>
> . . .
>
> (O) other proceedings affecting the liquidation of the assets of the estate. . . ."

28 U.S.C.A. § 157(b)(2) (West 1993).

Petitioner's antitrust claims arise from a post-petition contract made by an officer of the bankruptcy court in the administration (specifically, the liquidation) of the debtor's estate. When claims satisfy those criteria, the courts of appeals have classified them as core matters. *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1400 (2d Cir. 1990), *vacated and remanded on other grounds*, 498 U.S. 964 (1990), *reinstated on remand*, 924 F.2d 36 (2d Cir. 1991); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987).[12]

The First Circuit considered the claim of a debtor-in-possession against a party who had purchased some of its assets but refused to pay the full purchase price. *In re Arnold Print*

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[12] *See also Sanders Confectionery*, in which the Sixth Circuit classified the plaintiffs' claims against most of the defendants as non-core matters, but held that those same claims against the bankruptcy trustee were core proceedings because they "related to his conduct during the . . . bankruptcy." 973 F.2d at 483. The same reasoning would apply here to Petitioner's antitrust claims, which relate directly to his conduct during the bankruptcy.

Works, 815 F.2d at 167 (Breyer, J.). The court characterized the claim as one "that arose out of the administrative activities" (*id.* at 168) of an "'officer[] of the bankruptcy court.'" *Id.* at 170 (quoting *In re Alan Wood Steel* 1 B.R. 167, 169 (E.D. Pa. 1979)). Because of "the matter of timing and the relation to judicial administration of the bankrupt's estate," the court held that the claim was a matter of core jurisdiction. *Id.* at 165-66.

Similarly, in *In re Ben Cooper*, the Second Circuit held that a debtor-in-possession's claim for breach of a casualty insurance contract was a core claim. The debtor had entered into the contract pursuant to its plan of reorganization, and the court reasoned that post-petition contracts with trustees and debtors-in-possession "are integral to the estate administration from the day they are entered into." 896 F.2d at 1399.

Petitioner's reliance on *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990) is misplaced. There, the court classified as non-core a RICO claim against the debtor's son based on the son's dissipation of assets that were subsequently declared property of the estate. The RICO claim did not arise from any transaction with the trustee, nor from the trustee's administration of the estate.

Petitioner's argument that "no court has found that antitrust claims are core proceedings" is likewise unavailing. The issue of core jurisdiction depends not on the legal theory of the claim but on the relationship of the claim to the administration of the bankruptcy estate. *In re Arnold Print Works*, 815 F.2d at 169 ("It is the nature of the proceeding – its relation to the basic function of the bankruptcy court – not the state or federal basis for the claim, that makes the difference here.")[13] The antitrust claims arise from the same facts as Petitioner's bid-rigging claim under Bankruptcy Code § 363(n), which is indubitably a core proceeding even under the limited definition espoused by Petitioner

[13] To the extent the absence of authority is of any significance, however, Petitioner has not cited, and Respondents have not found, any case holding that antitrust claims arising from the administration of a bankruptcy estate are *non*-core proceedings.

himself. *See* Petition at 17 (citing *Barnett* for the proposition that a proceeding is core if its invokes a substantive right created by the federal bankruptcy law). It follows that these antitrust claims are core claims because they challenge the sale of estate assets – a "basic function of the bankruptcy court."

The position urged by Petitioner would cause substantial disruption of bankruptcy practice, and would result in increased litigation in the district courts. Debtors-in-possession and trustees have long rested secure in the assumption that bankruptcy courts have core jurisdiction to award them relief in adversary proceedings arising out of such core activities as the sale of estate assets. Petitioner himself made that very assumption when he filed this case in the bankruptcy court, specifically alleging in his complaint that "this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and 157(b)(2)(N)."

Petitioner's admission that the bankruptcy court had core jurisdiction over the antitrust claims was legally correct.[14] Accordingly, the bankruptcy court sale order bars Petitioner's antitrust claims even if Petitioner were correct that only core claims are precluded.

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[14] Since Petitioner's claims arise from a post-petition transaction between Petitioner (in his capacity as trustee) and Respondents, classifying them as core matters is entirely consistent with the Constitutional limits articulated in *Marathon*. A claim based on transacting business with an officer of the court does not implicate private rights. *In re Arnold Print Works*, 815 F.2d at 170.

CONCLUSION

"This Court has long recognized that '[public] policy dictates that there be an end to litigation,'" and that "[t]he doctrine of *res judicata* serves vital public interests" in bringing about that result. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), *quoting Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). A writ of *certiorari* in this case would ill serve that policy. Accordingly, and for all the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

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Respectfully submitted,

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